

# Academic Panel Comments on Removing Disposition Authority from Commanders

## I. Impact on Good Order and Discipline

### A. Negative Impact Predicted

1. **Professor Chris Behan, Southern Illinois University School of Law:** The Uniform Code of Military Justice works because it is designed as an instrument to help commanders maintain good order and discipline. It is but one tool among many in the accomplishment of that objective, and military lawyers, like all other specialized staff officers in the military, exist primarily in order to help commanders fulfill their responsibilities. It is a unified system in which all aspects of the case from investigation to approval of court-martial findings are the ultimate responsibility of the commander.

Total removal of the commander from the American military justice system would irrevocably alter its character, diminish its utility to commanders, and, if replaced by centralized military justice systems such as those adopted by some of our allies, degrade its flexibility and ability to adapt to local conditions, both internationally and domestically. A partial removal of the commander from the system, such as that suggested in the Military Justice Act of 2013 (MJIA 2013), would create chaos and prove to be a significant disruption to both the discipline and justice functions of the UCMJ.

*Written Testimony to Response Systems Panel (RSP) Public Meeting at 2 (Sept. 21, 2013).*

2. **Professor Geoffrey Corn, South Texas College of Law:** I reiterate my belief that I consider the fundamental change to military justice proposed in Senator Gillibrand's bill to be extremely unsound. In my opinion, it's empirically unjustified and very likely to produce the exact opposite effect that those who support the proposal seek to achieve. I also believe that it will produce a genuine risk of second order negative effects that will undermine the efficacy of legal support to military operations.

I believe the commander must retain a prosecutorial role in our military justice system to ensure that it's a system that produces military justice and not merely justice in the military. And I don't believe those are the same things for many of the reasons my colleague, Professor Behan, noted.

I think our system has to produce more than merely justice in the civilian sense. It must link the accomplishment of justice to the interest of good order and discipline and ultimately to a commander's confidence that the military unit that he or she is responsible to lead into combat is ready to meet this challenge, and the subordinate's confidence that the commander is prepared to lead them effectively. This is a much more complex end state for a state designed to respond to allegations of criminal misconduct than the civilian criminal justice system. Accordingly, I believe it is the central and essential role of the commander in this process of dispensing justice that is at the core of true military justice.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 20-22 (Sept. 24, 2013).*

3. **Professor Victor Hansen, New England School of Law:** [A]ny reforms to this aspect of military justice should not ignore the important role that the commander must exercise in order to maintain good order and discipline within the unit. Military justice is a tool of the commander, and reforms must not ignore this fundamental principle.

I do not support legislative reforms that would remove the commander from making the charging referral decisions in courts martial either for a subcategory of offenses or more generally. Such an approach, I believe, would take away from the commander one of the most important tools of command, and the commander would be left with the responsibility, but not the authority, to maintain good order and discipline within the unit. I also disagree with those who would advocate for these changes specifically in sexual assault cases because I do not believe that these changes would have a significant impact on the military's ability to effectively prosecute these cases, hold offenders accountable, while at the same time, protecting victims.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 28-29 (Sept. 24, 2013).*

4. **Professor Rachel VanLandingham, Stetson University College of Law:** [O]ur members of today's U.S. forces are consummate professionals. And I doubt that they're following their commander's order because they're think they're going to wind up being court martialed tomorrow if they don't. They don't anticipate violating an order. They follow out of a sense of duty and professionalism. But because of the same reasons -- for the same reasons we place commanders in such roles of great responsibility and we do trust them to order our sons and our daughters and our brothers and our sisters into combat and at times to their death, why not maximize that good judgment, that decision making acumen and attach it and combine it with that of a military lawyer, who does have the training, the objectivity, et cetera?

I mean, I think if you had someone that we trusted and vetted as much as commanders in the civilian community in a corporation, we would want to maximize and have that synergistic effect because prosecutors don't always get it right either. I mean, you have the Duke lacrosse cases, and then you have the acquittal avoidance syndrome that you've received information about. So I think it's not necessarily completely hinging on that suddenly we will have a breakdown and degradation of discipline within the military if you take the commander away.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 87-89 (Sept. 24, 2013).*

5. **Prof. Corn:** [Question from Ms. Holtzman]: [W]hat is the connection, the logical connection, between the claim that the commander sends people to their death, and the role of the commander in sending cases for prosecution? I mean, if we analyze this a little bit more in depth, you can say what is the willingness of people to follow a commander who is perceived to be unfair? What is the consequence of that? . . . I

mean, it seems to me that the implication of unfairness could be extremely corrosive of discipline and of morale. And so, why put the commander in that position?

. . . Why would people -- and not quite to the same degree, but why would people obey the police because basically their decisions on arrests are going to be decided by prosecutors as to how to implement it? We have a constant division in our society between the enforcement, the arrest function, the prosecution. The prosecution is not normally in our society handed to heads of corporations or others. So I don't see that changing this would be -- would affect -- would so undermine our sense of how a proper society or a fair society works that we would have no discipline in the military, that commanders wouldn't be followed.

I'm not following the logic of your argument. . . . I think this is an inductive leap without evidence. I'm not saying that it couldn't be true. I'm just saying how do you get to the point that because a commander sends somebody to his or her death, that they then have to have the power to send someone to be prosecuted or not prosecuted. Where is the logical connection?

[Response from Prof. Corn]: I'm not saying that you have to have that. Obviously we have members of the Panel who come from armed forces where commanders give the same orders, and unfortunately sometimes the service members responding to those orders either have to take life or lose life.

It's the exact opposite, I think, though. That is the point I'm trying to make. You start with the supposition that the commander is going to exercise his authority arbitrarily and will, therefore, corrode the relationship of command and subordinate. I wouldn't disagree with that. But if the commander is exercising the authority properly, if the members of the unit recognize that when there is an act of misconduct in the unit, it's handled efficiently and fairly according to fair process, that builds the sense of confidence in the leadership of the organization and enhances that command relationship. I think that is the entire foundation of the military justice system and has been emphasized in prior reform efforts that by ensuring fair process in the process of achieving discipline, you enhance good order and discipline in the unit because it builds that bond of confidence.

[O]ne other comment. All of the members of the Panel, either whether on, as one of the Panel members indicated, this side or that side, agree that a commander must retain a function in the discipline process. How you distinguish discipline from crime I find somewhat perplexing. Is cutting off the ear of a dead enemy combatant in combat a discipline matter or a criminal matter? . . . It's a violation of the Geneva Convention. It's the abuse of a body. It can have potential massive consequences if it's not addressed adequately and rapidly. Do you hand that to the prosecutor, or does the commander deal with that?

Is the sexual assault of a member of your own unit a disciplinary problem or a criminal problem? To me, they're intertwined, and that's why the commander has to have a role in responding to them.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 81-85 (Sept. 24, 2013).*

6. **Profs. Hansen and Corn:** [Question from Mr. Bryant]: Chiefs of police in this country and some sheriffs, too, command forces that are least brigade size in our major cities. . . . Would you recommend then that in those police forces the chief of police would decide when an officer commits a crime, whether or not that officer is going to be prosecuted, that that chief of police then selects from his department who will be on the jury, and that if he disagrees with the decision of the jury, he can either change that or reduce any sentence? *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 74-75 (Sept. 24, 2013).*

[Prof. Hansen's Response]: I think the analogy breaks down in a fundamental way in that we expect something from our soldiers that we don't expect from police departments. I mean, commanders, for example, in a combat environment give orders to soldiers that they know a soldier may die as a result of those orders, and the soldier is obligated under law to obey those commands. You don't have that similar relationship. You don't have that same level of command and control necessity in a police force. I think there -- because of that, that's a fundamental difference where the analogy doesn't work as well.

Now, to your point about having chiefs of police select the panel members that would try an offending person, I absolutely agree that there are reforms to the military justice system, and one of those, in my opinion being that I don't think a commander needs to be responsible for selecting the members who will try the case. So I would agree that there are certain things that a commander does not need to do to maintain the essence of command in a discipline system. But I do think that your analogy to a police department breaks down at a fundamental level because we expect things of soldiers, and we expect things of our military forces. And they have a mission that is unique and different than any other institution in our country.

[Prof. Corn's Response]: And if I may add, to Professor Hansen's point, certainly police officers, first responders, people work in a fire department, have a job that requires an incredible amount of courage to the direction of danger. We know that. But in the military, the obligation of the service member is fundamentally different in a different sense. The role of the military is to close with and destroy the enemy. That requires an unhesitating willingness to employ deadly combat power on order, not in response to an imminent and immediate threat. That is a fundamental difference between the use of force in war and the use of force in peacetime by law enforcement personnel. A law enforcement officer is trained to respond to an imminent threat of death or grievous bodily harm to her or the person that she's protecting. But law enforcement officers are not expected to have another superior point to a person who's in a barracks, who may be sleeping, or who may be running away, and say engage that target. The need to ensure, number one, that that subordinate will respond to that order and, number two, that that subordinate has confidence in the judgment and the leadership of the person giving that order, that it's the right order, is a very unique aspect of military service.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 75-78 (Sept. 24, 2013).*

7. **Prof. Corn:** [Question from Mr. Bryant]: [M]y office and other offices in military areas prosecute military members who have committed murder, rape, DUI. And, frankly, and nobody is proud of this, probably a thousand of the 2,500 DV -- domestic

violence cases we do per year are military members. Not once have I heard military commanders say, boy, these civilian prosecutions are just killing me. Nor have I heard, you know, gee, I wanted to be the paternal person in charge here, but you all have taken that away from me, you're ruining morale and discipline in my unit. Nor have I seen one service member . . . say, gee, Mr. General, gee, Mr. Admiral, I thought you were going to protect me in this situation, but I'm thrown to the wolves here with the civilians. . . . [I]s it affecting morale and discipline, all these civilian prosecutions of military members, many of which are military on military?

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The . . . point I'm trying to make . . . is when we say that military commanders are disadvantaged when we take them out of the decision making process for prosecution, we have thousands of cases across the country per year where they're not involved at all.

[Response from Prof. Corn]: I don't believe they're not involved. In many installations, there are memoranda of understanding between the base commander and the staff judge advocate and the local district attorney that lay out an equation for managing concurrent jurisdiction. I also think that in any serious case, the staff judge advocate is going to be consulting with the military commander. And the mere fact that the State jurisdiction may exercise jurisdiction first doesn't deprive the military commander of exercising jurisdiction.

So the . . . last point I'll make is, I don't believe I nor Professor VanLandingham have said that removing the commander will destroy the commander's ability to command a unit. What we're arguing is that retaining the role of the commander in this process enhances the entire process. It enhances the pursuit of justice because you get the advantage of the expertise of the legal expert and the person whose most in tune with the needs of the unit and the mission. And it enhances the perception of justice because, contrary to my colleague, I do believe military lawyers are in a position periodically to override decisions of commanders. The commander says he's going to do something illegal. The lawyer elevates that to the next level of command, and that's all we're proposing.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 132-37 (Sept. 24, 2013).*

8. **Prof. Corn:** [T]he comparison between the military prosecutor and the civilian DA is an invalid comparison. The function of the military prosecutor is substantially different because the military prosecutor is contributing to the commander and building that relationship of trust and confidence between him or her and the forces that have to be led in combat. No civilian prosecutor shares an analogous responsibility to prepare a unit for combat and ensure that it's combat ready.

Furthermore, I believe that a fundamental difference between a civilian prosecutor and a military prosecutor is that the civilian prosecutor is expected to understand fundamentally the needs of the community. In the military, it is the commander that first and foremost understands the needs of the community because that community is the military unit. And it's ultimately the commander's responsibility

to have his or her finger on the pulse of that community and not the JAG's responsibility.

The JAG facilitates the commander's function of ensuring that unit is prepared by responding to issues that negatively affect that unit, which is, in effect, a community. So to shift the prosecutorial responsibility exclusively to the JAG would, in effect, dilute the effectiveness of an understanding of criminal justice that serves the interests of that very special community in the military.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 26-27 (Sept. 24, 2013).*

9. **Prof. Hansen:** [O]ne concern that I have that I do not believe was considered in the reforms in either Canada or the United Kingdom or elsewhere is how removing the commander from that authority to impose discipline on his forces, in essence, takes away his authority, but not his responsibility under the doctrine of command responsibility. And I think there is a real concern in my mind that removing the commander from that role takes away an important tool, while at the same time putting -- keeping the commander on the hook for the failings of the subordinate forces. And that's a comparison that does not work well in a civilian CEO context. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 69-70 (Sept. 24, 2013).*

## **B. Negative Effect Not Predicted**

1. **Professor Michael Drapeau, University of Ottawa:** [A]s long as the military justice system continues to have jurisdiction over both disciplinary and criminal offenses, to be effective it has to have two antipodal focuses. First, for disciplinary offenses, the focus must be on meeting the needs of the military, particularly the chain of command, in order to enforce discretion and rehabilitate offenders before returning them to military duty. And second, for criminal offenses, however, the focus must be on the delivery of victim-centered service by deterring and mitigating crimes, as well as sanctioning those who violated laws with criminal penalties so as to increase the safety of vulnerable members of society.

At present, however, the focus is on the needs of the military for both disciplinary and criminal offenses. This is particularly evident when the executive, at least in Canada, where such reviewing authorities or reviewing officers and suspending authorities are permitted to toss out a criminal conviction or eliminate a sentence handed down by a competent court and jury following a finding of guilt on the basis of a beyond a reasonable doubt.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 48-50 (Sept. 24, 2013).*

2. **Professor Amos Guiora, University of Utah College of Law:** The primary difference relates to "the balance of power" between the commander and the judge advocate. In short, while serving as judge advocate to the Navy and Home Front Command in the IDF, I was solely entrusted with the decision to order the filing of an indictment against a soldier or officer. Simply put, the commander was granted no authority in the matter whatsoever. While I notified the commander of my charging

decision and was open to his input, the decision was exclusively mine in consultation with my own commander, the Judge Advocate General.

The decision in Israel to create a system whereby indictment decisions are an exclusive bailiwick of the JAG reflects a profound belief in the system and also, I think, in the country that the separation between judge advocates and commanders is necessary in order to prevent undue command influence. Needless to say, in the name of full candor, it's obviously a bone of contention and particularly when commanders are of the opinion that an indictment decision may well impact Israeli national security.

This became a matter of public concern when a one-star general was indicated by the JAG, and the then chief of staff expressed great concern that the indictment against that one-star would impact Israeli national security. The response of the JAG was very clear that the offenses committed by this particular one-star were so egregious that, with all due respect to Israeli national security, the crime committed and the harm to the victim far outweighed Israeli national security.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 52-53 (Sept. 24, 2013).*

3. **Lord Martin Thomas of Gresford QC:** [N]obody is suggesting that the commander should lose disciplinary powers in the military sense. It's when he becomes involved in the criminal process that the objection is made. What has happened in the United Kingdom was expressed by the director of Service Prosecution, Bruce Holder. And in an email to me, he said that COs are rather pleased about the changes that are taking place and that they no longer have to make the difficult decisions about certain cases, weighing up competing interests, nor are they open anymore to having their ears bent on the question of the choice available to them. And they have more important things to do than chasing errant soldiers and wasting time on paperwork.

So I was expecting to hear from the Ministry of Defense that there were objections to the changes within the military from commanding officers and from those in the chains of command. And I was surprised to discover that having consulted with Lord Astor of Hever, the Undersecretary of State, that they were simply not aware of any discontent at all within the services over the removal of the CO's powers. So the change in the United Kingdom has been [e]ffected without any difficulties that have surfaced. . . . I can confirm there has been . . . nothing expressed in Parliament on the removal of the CO's powers in this regard.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 71-72 (Sept. 24, 2013).*

4. **Prof. Drapeau:** [I]n Canada, in fact, the Director of Military Prosecution handles this task. Back to your question, what impact does this have upon the quality or the immediacy of legal advice to the commander, none, perhaps even better, because there is a separation between legal advice on everything but the prosecution of criminal offenses.

We have to keep in mind that a commander has got several issues uppermost in his mind that he has to look after, including the mission, the leadership

of his people, the morale of his people, and, more importantly, discipline. Discipline doesn't necessarily lead to a charge either for service offenses or criminal offenses. That's what the commander does. And he has a legal advisor to provide him immediate advice on the day in/day out basis in Canada for the past 15 years. I can't remember a single commander at various levels saying that, in fact, this has somehow diminished his ability to exercise his command and the quality of his command, or the quality of his leadership. I would suggest it would be the reverse.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 73-74 (Sept. 24, 2013).*

5. **Prof. Guiora:** It seems to me that there's a fundamental question that is being faced here, and I think your question hones in on that, is who are we seeking to protect here, . . . the unit or the victim? And the decision that was made in the IDF way back when was, with all due respect to the unit, right, as some sacrosanct body, there's something more important than unit, and that is the person who is the victim of a crime. And I understand the unit. I served in the military. I get this. But I think that with all due respect to this idea of the unit, if somebody has been, again, a victim of a crime, that person, he or she, is more important than the [sanctity] of the unit.  
*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 90-91 (Sept. 24, 2013).*

6. **Profs. Guiora and Drapeau:** [Question from COL (ret.) Cook]: [O]n the international side, like I said, we've looked at whether we keep it the way it is where we've got the commander and the JAG in it, or make the lawyer elevated. In your systems, you've either taken the lawyer -- you've either taken the commander out or you've left the commander in for disciplinary purposes, but you've left the lawyer in as a lead role in your prosecutorial decisions. How has that impacted that relationship?

[Response from Prof. Guiora]: [I]n the IDF, my commander was the JAG. The JAG is the one who filled out, I think, what's called a yearly evaluation form. The commander had no say in that whatsoever. So I serve solely under the Judge Advocate General of the IDF. As I said earlier, we have a unified command. There's not an Air Force JAG or a Navy JAG or an Army JAG. There's one JAG, and I served under him.

[I]n the context of my IDF service, I also was a commander, and I never felt in any way undermined when I had soldiers who committed crimes and the JAG, not me, but another JAG determined their fate. And that struck me as perfectly reasonable in the context of our system is structured. I didn't feel that my soldiers viewed me negatively because I didn't have the command authority to determine what to do with my own soldier. That's what JAGs do, and it was a soldier serving in the JAG corps.

With respect to the question of prosecutorial crime/disciplinary matters, as I said earlier, commanders have the disciplinary authorization or the authority. . . . The prosecutorial decision making is solely in the hands of the JAG.

[Response from Prof. Drapeau]: In Canada, unit commanders are still involved at the disciplinary level for summary trials. That hasn't changed. For prosecutorial



offenses, we have a separate director of military prosecution. And the commanders of those who are prosecuted, they have cut the umbilical cord. They have nothing to do at all with it. They're totally taken out of the equation.

My position is quite clear. The chain of command -- the entire chain of command should be taken out of anything but the disciplinary system. Any criminal offenses should be left to the military justice system.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 126-31 (Sept. 24, 2013).*

7. **Prof. Drapeau:** I have commanded myself in the past. I cannot see what the interest of a commander would be. Even in combat, if one of his soldiers is accused of sexual assault, murder, torture, a major crime, why would he want to continue to be involved in any aspect of prosecution of as opposed to putting it into the hands of the proper authorities that would prosecute this and see this to come to trial? If for no other reason, he also owes a duty to both his unit and other people under his command, particularly if the victim is residing from within. So why would he want to take a role and lose any objectivity that he may have, impartiality, and [h]is focus on delivering the mission? I just can't make it. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 80-81 (Sept. 24, 2013).*
8. **Lord Thomas:** Where I have difficulty is . . . that the criminal law deals with what's happened. It's in the past. . . . I can't see the connection between that and the unhesitating willingness of a soldier to respond to an order. I don't see that what has happened in the past, and the investigation of that, and how that is done, and whether it is fair, and whether it results in confidence in the justice has anything at all to do with the discipline that sends someone over the top to do something that is quite extraordinary and maybe very brave. I don't see that it is necessary for the commander to exercise that investigation and punishment function in order to ensure proper discipline in action. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 79-80 (Sept. 24, 2013).*

### C. Operational Considerations

1. **Profs. Hansen and Drapeau and Lord Thomas:** [Question from Professor Hillman]: [O]ne of the arguments that was raised to us in preparatory sessions was specifically about crimes of war. It was about violations of the laws of war and a very strong suggestion from some that removing the commander from this process in U.S. military justice would undermine the United States' ability to engage in actions that could result in prosecutions for law of war violations committed by service members of other forces, who might be subject to some civilian or non-command centric criminal prosecution.

In other words, the argument that our military, the U.S. military, will be less effective on the ground in multinational deployments where service members of other nations cannot be ordered to undertake the most dangerous, the most important, missions because the United States insulates its service members from criminal prosecution outside this command-centric military justice system. And that insulation is critical to the United States being successful on the ground. This is a very troubling argument to me.

I want to know your reaction to it. Do you think that it's right, and, first, do you think that if that's true, it would inhibit a commander's options on the ground, and, second, do you think that would or would not be a salutary consequence?

[Response from Prof. Hansen]: I don't buy that argument. I don't think that's accurate under the law of war, under the doctrine of command responsibility either, that that's -- or that that's a reason to keep the commander in charge of the system. I think my point on that very issue is just the opposite, that keeping the commander in the system, because the commander can't avoid that responsibility. That's a responsibility that the commander is going to have as a result of his or her position. And so, to take away from the commander the tool -- that important tool to impose punishments has exactly the wrong effect, is that they now have less ability to ensure good order and discipline, and specifically ensure compliance with the law of armed conflict that they can't avoid by simply insulating or somehow trying to insulate a subordinate from the consequences of their illegal conduct. I think that argument has it exactly backwards.

[Question from BG (ret.) Dunn]: I don't think what we're talking about is commanders remaining in the system, allowing them to protect soldiers on the ground or commit violations of the law of war. I think what the previous discussion was addressing is the concept of, you know, a commander with the advice of a lawyer operating on the ground, you know, has the soldier engaged in certain conduct. And then you have a civilian system back in the homeland that has the ability to reach in and address . . . that operation in a . . . completely independent manner with . . . no military experience, no understanding really of the law of war.

[Response from Prof. Hansen]: I think that having civilians some miles away come in and either arm chair or second guess is a problem. My suspicion is that, frankly, that in many ways, they might be more lenient to the conduct of a soldier in combat than perhaps a commander is who can better contextualize what the consequences of that misconduct or what those actions are and given that the commander would ultimately be responsible for ensuring that discipline. I see that concern, and I agree that that would additionally be problematic taking the commander out of that decision making process.

[Response from Lord Thomas]: I think that the system that we have does not take the commander totally out of it, as my colleague, Professor Drapeau, has said. What happens is that the rules require a service police officer to notify the commanding officer of anything that comes to his attention by way of a crime. And the commanding officer can put forward to the Director of Service Prosecutions any relevant factors he thinks fit.

So in the situation that was envisaged by the Brigadier General, the CO would be able to put before that civilian independent prosecutor any matters relating to the incident which was under investigation that he thought fit. And furthermore, the CO is not taken out of the system entirely because he is informed of the progress of the investigation by the Director of Service Prosecutions, and the CO is required to sign the charge sheet personally. He has no choice about it . . .

The CO signs the charge sheet that Director of Service Prosecutions puts before him to sign, and to that extent has ownership of it and knowledge of it, and can communicate to his -- those under his command that he has a part to play within the system of the prosecution of the individual. And that seems to me to be a rather more satisfactory solution than keeping the CO out altogether, or involving him in the actual decision making as opposed to putting his imprimatur on a decision that's already been taken.

To sum up, it seems to me that the CO does have a role in making representations to the director of Service Prosecutions and putting forward the sort of matters of concern. He does have a formal part to play by signing the charge sheet, but the independent prosecutor remains independent and makes that decision independently. And I would commend that system above the . . . existing system . . .

[Response from Prof. Drapeau]: And if I may, I did not want to remove the commanding officer totally from that process. He does exactly the same in Canada. He does sign the char[ge] sheet, and he is involved in speaking to and informing the Director of Military Prosecution of any factors. But he's not making -- he doesn't have decision powers in this stage.

[Response from Prof. Corn]: I think there are gradations of attenuation between the military prosecutor and the command itself that influence that concern. So I would agree that obviously the examples that we're being exposed to here from the United Kingdom and Canada and Israel, there is not substantial attenuation between the military prosecutors and the commander.

There are countries where there is substantial attenuation. For example, in Colombia, the Fiscalía, the federal prosecutors, decide who gets prosecuted for misconduct in battle. There are constant concerns raised by the Colombian armed forces that they cannot make a distinction between combat activities and non-combat activities, and that is a profoundly significant distinction, as you know, in terms of what is or is not a justifiable act of violence. So I think -- but I don't think that that is the princip[al] concern. I think that if you're going to think about operational legal compliance, you have to start at the other end. The law of war is a regulatory body of law. It is not a responsive body of law that's designed principally to sanction. It's designed to prevent the violations that have to be sanctioned, the sanction as supposed to the exception. The compliance is supposed to be the rule.

And we should be rightly proud of the fact that we have enhanced the role of the military lawyer in the battle command process to a level that we've never seen before. I mean, they are absolutely central to the process, and our joint doctrine reflects that now, both in the role of the military lawyer and the role of legitimacy as a core tenant of military operations right up there with objective and security and initiative, all those traditional objectives of war. My concern is that the more you compartmentalize the function of the military legal advisor in garrison, the more compartmentalized that function is going to be perceived in operations. And it's this interaction that builds that level of confidence between commanders and the military legal profession writ large that has paid, in my view, a very significant dividend. And I'm not in any way suggesting that you couldn't develop those relationships without that. I just raise the question why wouldn't you want to maximize that relationship if

you could do it in a way that enhanced the credibility of the criminal system instead of diminished it.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 139-49 (Sept. 24, 2013).*

2. **Prof. Corn:** [Question from Prof. Hillman]: The question is, can that attorney, that staff judge advocate, that senior legal advisor, perform all of those different roles at one time, especially in this very specialized piece of criminal prosecution, which is the investigation, the weighing, the incredible complexity that we end up in some of these sexual assault cases.

[Response from Prof. Corn]: [M]y response to that would be to compare the record of prosecutions for operational misconduct today, which -- that which existed in early eras. I think that by having the JAG as an integral part of that battle staff, yes, does it create risk that the JAG will become too inculcated into that culture to be objective? I think that's a risk, but I think the evidence actually points to the opposite, that their exposure to everything that's going on in the course of that mission actually exposes them to situations of misconduct early on. . . . I think that it is a reflection that the integration of the judge advocate into the battle command process itself has provided a level of situational awareness that in the past we had to rely on the unit itself to provide the information to the JAG.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 150-51 (Sept. 24, 2013).*

## **II. Logistical Impact (and Its Relative Importance)**

- A. **Prof. Hansen:** It is [ ] important for this Panel to consider the practical realities of reforms that would remove the commander and establish a centralized prosecution office to make charging decisions. I think the Panel must be careful about comparisons with courts martial systems in other countries with much smaller services, many fewer courts martial, and no similar expeditionary mission. In 2012, for example, there were 725 general courts martial, 465 special courts martial, 473 summary courts martial tried in the Army. In addition, there were 34,772 impositions of non-judicial punishment in the Army.

Given these numbers, I believe it's impractical to think that one or even a few of very senior prosecutors could manage the volume of cases and give each case the individual attention and focus required. The likely result is that these decisions would be delegated down to much more junior JAG officers who have less legal training than senior JAGs and less experience in the military than senior military commanders.

Beyond these practical concerns, the commander is accountable for taking all reasonable and necessary means to ensure good order and discipline, and certain obligations are non-delegable. These include disciplining subordinates and understanding both the context of the misconduct and the impact on order and discipline within the unit. These, I believe, represent the core functions of command, and I believe it would be both unwise and inefficient -- ineffective, rather, to remove that responsibility from the commander.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 31-32 (Sept. 24, 2013).*

**B. Prof. Corn:** [S]hifting prosecutorial discretion exclusively to the JAG will undermine the efficacy of legal support to military operations. Never in our history have military lawyers been so comprehensively integrated into the battle command process than today. Indeed, our operational law model is an icon many other armed forces aspire to emulate. With legitimacy a core tenant of joint military operations, it would be strategic folly to jeopardize the progress made over the past several decades in developing a culture where the military lawyer plays a central role in the planning, execution, and oversight of military operations. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 23-24 (Sept. 24, 2013).*

**C. Prof. Guiora:** I remind all of us of the wise words of the former chief justice, who we call in Israel president of the Israeli Supreme Court, Aharon Barak, when a different context said the following. It's a rough translation from Hebrew. "The individual must not bear the logistical burdens of the state." And so, the argument that distance and logistical concerns perhaps are a reason to have the commander at all make the command decisions, if you view it from the perspective of then President Barak that what is most important here are the rights of the individual -- we're talking about here the victim -- in the context of minimizing command influence, I would suggest that is point one. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 55-56 (Sept. 24, 2013).*

**D. Professor Eugene Fidell, Yale Law School:** I personally don't see that there is a tension between logistics and affording . . . people their rights. I mean, the U.S., we have a wonderful military. It never has enough resources, but it's got tremendous resources. And indeed we've been able to administer justice in country, in Iraq, Afghanistan, Vietnam. We were conducting trials basically in the jungle in Vietnam. Anybody here remember that? So, you know, we are capable of doing it.

There are issues as to where cases should be tried, and some of those were developed, frankly, by the Defense Legal Policy Board, and I hope everybody on the Panel has a copy of the report of that board. But there has never in my knowledge been a sense that it would be an insuperable or even a serious or any change, in fact, in those questions, the feasibility of trial, if you had a trial counsel function outside the chain of command. I just -- there's no connection between those two.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 100-01 (Sept. 24, 2013).*

**E. Prof. Guiora:** [W]hile the logistical question is absolutely essential, the broader question, which ties into the logistical question, is what I said to Ms. Holtzman, is what's the primary burden here in terms of what rights are we protecting? Are we protecting the rights of the unit or are we protecting the rights of the individual? I think that's the larger philosophical existential question.

If we determine that the primary purpose of this entire conversation . . . is to protect individual rights, then it would seem to me that systems at the end of the day, you know, reflect what individuals have decided, that systems can be put in place that

would enable the JAG, again, based on my experience in the IDF. The JAG can be put here, it can be put here, and, you know, there can be courts here, and there can be courts there. I mean, I don't think that a logistical question, again, paraphrasing Barak, is more important than the rights issue, because I think at the end of the day what needs to, at least -- again, from my experience in the IDF, that the primary concern here is the rights of the individual in this case or the victim. And I think seems, at least in the IDF experience, is superior to the rights of the unit. And if you determine that it is the individual's rights that are more important than the unit's rights, then logistical decision making just falls lockstep into that.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 98-99 (Sept. 24, 2013).*

### III. Disposition Objectivity and Expertise

#### A. Strengths and weaknesses of commanders as disposition authorities

1. **Prof. Behan:** There is nobody, I believe, in the military justice system more equipped, given better information, to be able to determine the effect of a particular offense, pattern of offenses, pattern of behavior in a command on the command, on its efficiency, on its good order and discipline, than a military commander. Military lawyers have a sense of this obviously. Those of us who have served, we get a sense of what's important about good order and discipline, but we don't get to make the ultimate call because we don't have that ultimate responsibility and authority.  
*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 118-19 (Sept. 24, 2013).*
2. **Prof. VanLandingham:** . . . I do have to counter Professor Behan's point that commanders get to make decisions in everything else. No, they don't. Commanders don't practice medicine. Commanders aren't in the operating room. And there are other areas in which we do vest professional decision making in other individuals besides the commander. Here I think the commander should be balanced by a formal role by the -- by a judge advocate. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 123-24 (Sept. 24, 2013).*
3. **Prof. VanLandingham:** The U.S. military structural DNA firmly places the archetypal commander at the center of achieving success on and off the battlefield. As Professor Hansen just mentioned, reposing such a responsibility for lives and vast resources in these individuals, which none of the current legislative proposals recommend changing, necessarily and logically means giving them the appropriate tool to manage such responsibilities.

In that vein, vesting sole prosecutorial discretion in the 1950s military commander was seemingly appropriate to help ensure good order and discipline. But today's prosecutorial authority wielded to help lead our immensely professional all volunteer force should maximize the legal expertise now resident in all levels of the military and be the product of a required consensus decision by lawyer and commander. Such a sound decision making process should not be limited to sexual assault or other serious common law crimes.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 35-36 (Sept. 24, 2013).*

4. **Prof. Guiora:** While [Israeli] commanders understandably express reservations as to their lack of role in the decision making process, the system, from my perspective, properly and effectively minimizes command influence in the criminal process to maintain and to ensure full accountability and impartiality in meting out justice. While my fellow panelists have emphasized the role of the unit, I think that both Lord Thomas and Professor Drapeau . . . would also agree with me that with all due respect to the emphasis on the unit, there are far more important issues than the unit, and those issues that are more important perhaps than the unit are indeed public accountability, the rights of the victim, and the need to indeed ensure that there's a full and impartial system.

On that note, it's important to add that in the Israeli system in the context of ensuring or seeking to ensure objectivity in court martial decisions, and ensuring that they are based on legal analysis rather than unit or command interest, it is in many ways for that reason that the JAG is the decision maker rather than the commander.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 54-56 (Sept. 24, 2013).*

5. **Profs. Corn and Fidell:**

[Prof. Corn]: [I]f you take this responsibility away from the commander, you could have a system where the commander would provide input to the JAG prosecutor deciding whether to bring a charge. But once that ownership shifts from the commander to the JAG, I believe that the commander's interaction with the JAG will be diluted. It will become less significant, less of a priority. And I do think that has second and third order consequences. It is the primary mechanism by which the commander/legal advisor relationship is forged, and where commanders learn to have confidence in the judgment of the military lawyers that have to advise them on a wide range of issues in very different contexts.

So I think that the commander will view it as somebody else's job, somebody else's responsibility. And, yes, he might, or she might be willing to offer some input if the input is solicited, but it's not going to have the same level of prioritization in that commander's daily sense of mission function that it currently has a fundamental element of the commander's mission essential tasks.

[Prof. Fidell]: I'm afraid that I don't agree with my friend, Geoff Corn's, assessment. It seems to me a commander is going to continue to be very concerned and very interested in this part of it. But like a senior executive in a corporation, let's say, and I'm not suggesting they're identical. I know that. We all know that. But nonetheless, if you have a corporation that has major litigation pending, the CEO doesn't just send it off to encapsulate it more and say, take care of this for me. The CEO is going to, you know, be interested in it, and may even express views. So I don't think that the notion that you give this legal responsibility to an independent trial counsel function means that the CO is going to wash his or her hands of it or sort of turn to other matters. What it means is the CO will be -- remain an interested party, have the opportunity to express views that, you know, may be fairly deeply held and, you

know, will be expressed that way. But they'll be expressed in a way that respects the basic legal nature of the charging decision.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 66-69 (Sept. 24, 2013).*

6. **Lord Thomas:** I'm hearing [the suggestion] that the purpose of maintaining the CO's position is to enhance his status as a wise leader, and to improve his status to be seen to be a fair decision maker. But, of course, it may diminish his status if he's seen to be an unfair decision maker when it comes to prosecution. And you can have a situation where in one regiment, the CO is thought to be very strict, and in the other regiment he's seen to be very weak. How does that help? Why don't we have an independent -- well, we do have an independent in Britain -- who achieves parity across the whole system? *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 91 (Sept. 24, 2013).*
7. **Prof. Fidell:** Charging decisions ought to be shifted from the command to a non-chain of command prosecutor. These are legal decisions that ought to be made by lawyers for offenses other than minor disciplinary offenses. Reforming Article 32 is a natural corollary of such a shift since all Article 32 officers do is make a recommendation to the convening authority, who can accept it or reject it. Once that shift is made, there's no need for a disposition recommendation. Restructured Article 32 hearings could be limited to determining probable cause, a role that requires little, if any, probing into witness credibility. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 61-62 (Sept. 24, 2013).*

## **B. The problem of underreporting**

1. **Lord Thomas:** A modern non-conscript professional military with increasing demands for skills and aptitudes, which are very marketable in the wider world, must concern itself both with recruitment and retention. [ ] [S]ervice discipline is, of course, an essential part of military life, but both for new entrants and for those who are making their careers in the services. It must be and be seen to be fair. Perceived unfairness leads to discontent, poor morale, and indiscipline.

The subjective decisions of commanding officers, even with the assistance of legal advisors, cannot hope to achieve the consistency and parity in every unit across all the services. . . .

In my country and in my Parliament, lawyers may not be too popular, but we do have the training to be objective, to assess facts to come to conclusions on set principles of law, and to deal with individuals with parity. This, I believe, is the success of the Director of Service Prosecutions in his department in the United Kingdom. He does not operate in some remote and arcane legal world. He is required to take account both of the effect of a prosecution on operations and of the importance of maintaining military discipline.

This I believe, is the success of the Director of Service Prosecutions and his department in the United Kingdom. He does not operate in some remote and arcane legal world. He is required to take account both of the effect of a prosecution on operations and of the importance of maintaining military discipline. The



Commanding Officer still has a role to play in that he may draw to the attention of the DSP any factors he considers relevant in relation to the accused and his military experiences, before the DSP makes his decision on prosecution. The CO also maintains his responsibility of dealing with minor offences, mainly of a military character. He has no jurisdiction with regard to sexual offences.

If reforms to the system have been prompted by concern for the fair trial of the accused, there is an increasing recognition that the rights of victims must be at the core of the criminal justice system. The existence of a prosecuting authority independent of the chain of command, does mean that complaints across the board will be taken seriously, that the fear of retaliation or of a blighted career is lessened, that anonymity and special measures where desired can be ensured, and that perpetrators, particularly of senior rank, can not expect any favours. Further, the Director of Service Prosecutions has the resources to monitor the proper investigation of such allegations by the service police.

If victims have confidence and trust in a system independent of the chain of command, they are more likely in my view to report offences. On the other hand, the present discretion of a US Commanding Officer to dismiss serious allegations of sexual assault must be a disincentive. The figures for non-reporting spoken to by Professor Lynn Addington on Day 1 of the Hearings, so suggested.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 43-46 (Sept. 24, 2013).*

2. **Prof. Guiora:** [R]ecent high profile prosecutions in Israel itself -- I add in parentheses -- you may know, the Panel may know, that the former President of the State of Israel is in jail for seven years for rape, and well he should be in jail for rape. But the fact that there's been indeed public prosecutions with enormous media visibility has significantly enhanced the trust that Israeli Defense Forces soldiers feel in reporting instances of sexual assaults and harassment. I would suggest that that increased sense of confidence is directly related, at least in Israel, to the forceful prosecution policy implemented by the JAGs who are, again, not in the chain of command. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 55 (Sept. 24, 2013).*
3. **Profs. Corn and Guiora:** [Question from Prof. Hillman]: If you could try to answer for me in your experience and in your estimation, so experience with respect to military justice systems that have shifted away from the command centric model the United States retained, and then your estimations of what would happen due to the conditions of service and conditions of military justice in the U.S., and specifically, too, if sexual assault is different in the U.S. versus how it is in other jurisdictions. How would a change away from command control alter the legal advising role of judge advocates, because that seems a big secondary effect that we ought to take account of. And it's not clear to me how this would play out.

[Prof. Corn's Response]: I will point out a couple of comments that were made by some of the fellow panelists. Professor Guiora noted increased -- the recent increase in reporting of sexual misconduct, and he attributed it to a greater sense of confidence in the fairness of the system. But it's a system that's been structured that way for a long time. So what accounts for the recent increase? It can't be that

there's been a sudden change in the system. And I believe that any system, I think we would all agree, has to have first and foremost as its fundamental objective the provision of due process in any criminal allegation.

[Prof. Guiora's Response]: Geoff, to your comment about the change, there are two reasons for that. I should've clarified that, and I apologize. One, as I mentioned earlier, the uptick in high profile prosecution of sexual assaults in Israel has clearly impacted the willingness of soldiers, men and women alike, to come forward. And the other was a law passed by the parliament in 1997, which imposed on the commanders an immediate duty to report any cases of sexual assaults. And it imposed on them the duty to report immediately.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 65-71 (Sept. 24, 2013).*

#### **IV. Empirical Comparisons (and Their Value)**

**A. Prof. Drapeau:** [W]e know there is a wide disparity between the number reported and the number of presumed assault, then these can be brought to prosecution. And that's the issue, and on which there is no empirical evidence, at least not from our country. We cannot tell you how much there is and how much difference this has made. I presume it has, but that's it. We cannot -- I cannot provide this kind of evidence. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 96-97 (Sept. 24, 2013).*

**B. Lord Thomas:** [Comment from COL Ham]: The members received a large amount of information, part of which was some materials from the deputy military advocate general of the Israeli Defense Forces, who pointed out that every year, 50 percent of complainants, sexual and harassment, choose not to report their complaint to the military police, and, therefore, a criminal investigation of these complaints is not conducted. So while as Professor Guiora pointed out there is an increase in the number of complaints from approximately 318 per year to 583 per year from 2007 to 2011, approximately 50 percent every year of those complaints are never investigated. The Israeli Defense Forces also provided us the number of indictments per year from 2007 to 2011. For 2007, out of 318 complaints received, there were 23 indictments. For 2008, out of 363 complaints received, there were 28 indictments. For 2009, out of 445 complaints received, there were 26 indictments. For 2010, out of 483 complaints received, there were 20 indictments. And for 2011, out of 583 complaints received, there were 14 indictments.

And the deputy military advocate general said, "We can't attribute the incline in complaints between 2007 and 2011 or the decline in complaints in 2012 to a specific reason. The rise in the complaints could be the result of a rise in the commitment of sexual offenses. Just as much, it could be the result of authorities' campaigns to raise awareness to the issue."

And as to the United Kingdom, the Library of Congress issued a report this past July on our Allied services for the United Kingdom. A survey in 2006 found that almost all service women who responded had been in a situation that involved sexualized behavior, with almost 70 percent responding that they had encountered sexual behavior

directed at them that was unwelcome. The length of service was found to play a role. The longer surveyed respondents had served, the more likely they were to perceive there was a problem with sexual harassment in the military. Thirteen percent reported they had been sexually assaulted, but only five percent of these made a formal written complaint. Reasons given for not filing a formal complaint included wanting to handle the situation by themselves, concern over being labeled a troublemaker, concern that the complaint would have a negative impact on their career, and concern that nothing would be done about it. For those who did make a formal complaint, almost half stated it took too long to resolve the issue, claimed they were not properly informed about the procedure, and were not satisfied with how the outcome was explained. Over half stated there had been negative consequences as a result of filing a complaint, with 64 percent considering leaving the service.

[Response from Lord Thomas]: [F]irst of all, the 2006 survey is no longer valid because, of course, things have changed, and, secondly, the analysis of recent things that you have received is flaw[ed]. The purpose of the changes, of course, in the United Kingdom were not limited to sexual assaults. They're across the board. If somebody hits you over the head or steals your car or burgles your house, you immediately complain to the police.

Sexual assaults [are] a very different thing. People don't complain about sexual assaults for the various reasons that were pointed out in that 2006 survey and for reasons that we all know and I won't go into. What is necessary is to have a system, which is seen to be fair and independent to create a climate in which complainants will come forward more willingly to make their complaints, and by their so doing and by the knowledge that they will so do, diminishing those who are likely to be perpetrators of sexual assaults at some future. So it's all a question of building up a climate of confidence in the system, which will result ultimately in the diminishing of sexual assault.

We believe, and I think one of our representatives will say that, that in the Royal Navy, the problem has been tackled. Complaints by young men, of course, are possibly more difficult than by young women. We position that has been tackled, and the -- it is believed that the incidence of sexual assault in the Royal Navy has been very severely diminished by steps that have been taken.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 102-09 (Sept. 24, 2013).*

- C. Prof. Fidell:** [Question from VADM (ret.) Houck]: I think as a Panel it would be helpful to know if there is any empirical data that goes beyond our intuition. Any of you want to comment on empirical data and how empirical data in your own armed services demonstrates a connection between the differences of your system and the U.S. system to a reduction in sexual assault in your own militaries?

[Response from Prof. Fidell]: I think that empirical data are, number one, unlikely to provide any assistance to . . . any of the multiple sides in this discourse. And speaking only for myself, I'm not looking to empirical data, and . . . I thought frankly the DoD numbers . . . intuitively struck me as a little high in terms of the, you know, sheer number of cases and some definitional issues. But . . . what we're talking about here is public confidence in the administration of justice. And in my opinion, public confidence is the touchstone that we should be concerned about, not whether a particular reform will drive

up, drive down, or leave the same the number of . . . complaints that are received, the number of cases that are brought to trial, and the number of convictions. I think it's much more important that all the affected interests, and that includes accused, persons who are complaining, and onlookers, family members, have the feeling that the system is a 21st century system that abides by the high standards that Americans have come to expect from the administration of justice. So it's not a numbers question for me, and frankly I think that's a hole down which the Panel should not descend because I think it's the wrong question.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 93-94 (Sept. 24, 2013).*

- D. Prof. VanLandingham:** [R]egarding the empirical evidence that Admiral Houck rightly brought up earlier, shifting things purely to a civilian -- purely to a military prosecutor is not -- does not necessarily lead to the conclusion that there will be greater prosecutions. In fact, I would refer the Panel to footnote 5 in Professor Corn's and my submission, in which there was a terrific recent study completed last year stating that in many current civilian studies, failure to account for the attrition that occurs prior to prosecutors accepting a case leads to inflated rates of prosecution, the incentivizing of prosecutors to filter out weak cases that would lower their conviction rates, the acquittal avoidance, and that, in fact, out of 100 forcible rapes in U.S. civilian jurisdictions, an estimated .4 to 5.4 are actually prosecuted in the civilian sector, which is a shockingly low, low number. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 124-25 (Sept. 24, 2013).*

## **V. Miscellaneous/General Observations**

- A. [All Presenters]:** [Question from Ms. Holtzman]: What's prompted this Panel and what's the scope of our jurisdiction is really the issue of sexual assault in the military. None of you have suggested that any of the changes that are made should be limited just to the cases of sexual assault. Is that correct?

[Response from All Presenters]: Correct.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 152 (Sept. 24, 2013).*

- B. Prof. Fidell:** [S]exual assault issues are important in themselves, but more broadly they shine a light on structural defects in the Code that apply to all kinds of offenses. The Panel should, therefore, consider the entire military justice system when recommending any changes. I'm sorry to make work for you, but I think that's the case.

Because the parts are interactive, sharpshooting one aspect or another would be unwise. Thus, tinkering with or abrogating the convening authority's post trial powers under Article 60 would make little sense without addressing the convening authority's pre-trial powers with respect to such critical matters as the decision to charge, jury selection, and pre-trial agreements. In my view, . . . the time has come to reassign those powers for offenses other than minor disciplinary offenses.

*Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 57-59 (Sept. 24, 2013).*

- C. Prof. Behan:** Many individuals and groups have suggested that removing the commander's influence from the military justice system altogether will improve the system considerably. They point to changes made in the military justice systems of some of our closest allies, who have removed both prosecutorial discretion and the ability to convene and administer courts-martial from commanders. These changes have primarily occurred in the wake of court decisions interpreting treaty obligations and changes in national charters of rights and freedoms. While I do not question the legal necessity or wisdom of what any of our allies have done with their military justice systems, I do think it is important to point out that similar changes are not constitutionally required in our system. With respect to military justice, the foundational constitutional principles have never been amended or changed: Congress has responsibility to create rules governing the armed forces under Article I of the Constitution, and the President has the authority to implement the military justice system in his role as Commander in Chief under Article II. Despite many well-argued efforts in the past one hundred years to divest commanders of military justice powers, Congress has maintained a command-centric military justice system, recognizing that good order and discipline—not justice for its own sake—is the primary mission of the military justice system. Moreover, given the tremendous deference the Supreme Court has traditionally shown to Congress's exercise of its Article I authority over the military justice system, we are unlikely ever to see a court decision mandating the removal of commanders in order to bring our military justice system into alignment with those of our close allies. *Written Testimony to Response Systems Panel (RSP) Public Meeting at 1-2 (Sept. 21, 2013).*